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March 10, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128

Dear Ms. Dortch:

On Wednesday, March 10, 2004, the following individuals, representing the companies or associations indicated, met at the offices of the FCC with Commissioner Jonathan S. Adelstein and Barry Ohlson, his Senior Legal Adviser, to discuss issues relevant to the above-identified proceeding:

Ben Almond	Cingular
Ann Bobeck	National Association of Broadcasters ("NAB")
John Clark –	Perkins Coie LLP – Counsel to the Wireless Coalition to Reform Section 106 (the "Coalition")
Peter Connolly	Holland and Knight – Counsel to U. S. Cellular
Diane Cornell	Cellular Telecommunications & Internet Association ("CTIA")
David Jatlow	AT&T Wireless Services, Inc.
Andre Lachance	Verizon Wireless

In this meeting, the industry representatives stated that the purpose of the meeting was to discuss with the Commissioner and his legal adviser some points that had recently been raised about the "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" ("NPA") that is the subject of the above-identified proceeding.

The industry representatives discussed the points of agreement that had been achieved in discussions over the past weeks between industry representatives, the Advisory Council on Historic Preservation ("ACHP"), the National Conference of State Historic Preservation Officers ("NCSHPO") and other members of the Telecommunications Working Group ("TWG"). These points of agreement involved the treatment in the NPA of properties whose eligibility for the National Register of Historic Places is possible but undetermined ("potentially eligible properties").

The points of general agreement included the following: (1) the NPA should not require surveys or identification efforts potentially eligible properties for visual effects; (2) the use of qualified professionals, for purposes of the identification of eligible properties readily ascertainable in the SHPO office, should be optional; and (3) the universe of eligible properties for which visual effects should be considered should be limited to those identified by the SHPO, and the research required to identify such properties should be limited to reviewing previous determinations of eligibility that are readily and clearly ascertainable and available to the public in SHPO's offices.

The industry representatives also discussed the provisions of the March 5, 2004 draft of the document entitled "Best Practices For Expediting The Process Of Communications Tower and Antenna Siting Review by Member Tribes of the United South And Eastern Tribes, Inc. and Licensees and Applicants of the Federal Communications Commission" ("Best Practices Agreement" or "BPA"). This document had been provided to industry representatives on Friday evening, March 5, 2004.

Industry representatives expressed concern that the scope of compliance requirements and Commission responsibilities that might be required in the NPA in connection with tribal participation procedures, as suggested in the Best Practices Agreement, would be unreasonably complex, and further, might impose on applicants excessive and unnecessary expense and delay. Industry representatives expressed their belief that these requirements would be significantly more burdensome than what the law currently requires.

Industry representatives suggested that such a negative result might be avoided if the NPA were adopted with the section dealing with tribal participation removed, to allow further development of this section, while tribal participation would continue to be governed by current law. Industry representatives further stated that in the alternative, adoption of the NPA might be postponed to allow time for further consideration of this section, or the NPA could incorporate language in the tribal

participation section that would be as flexible as possible to allow further development of a more practical Best Practices Agreement with industry input.

The CTIA representative also mentioned industry support for the exclusions identified as numbers 4 and 5 in the NPRM version of the NPA, as recently modified and apparently approved by the Advisory Council on Historic Preservation ("ACHP") and the National Conference of State Historic Preservation Officers ("NCSHPO").

Counsel for the Coalition submitted to Commissioner Adelstein and Mr. Ohlson a document, a copy of which is attached as Attachment 1, outlining industry concerns with the BPA and similar concerns with the NPA itself, to the extent that the same or similar provisions might also appear in the NPA.

Respectfully submitted,

John F. Clark

John F. Clark
Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

Outline of Issues of Concern in the NPA Regarding Tribal Participation

March 10, 2004

- Many in industry are concerned that the draft Best Practices Agreement ("BPA") suggests that the tribal provisions of the Programmatic Agreement ("NPA") could significantly increase the complexity, delay and expense of complying with Section 106, over what the law now requires.

- The BPA was developed by the FCC and United South and Eastern Tribes ("USET"), with no meaningful opportunity for input from industry, until this week.

- The procedures and time frames in the nominally voluntary BPA, must naturally be consistent with mandatory procedures in the NPA, and even voluntary BPA procedures that are FCC-endorsed will inevitably become de facto minimum standards.

Eight Problematic Procedures Disclosed by the March 5 Draft of the BPA

1. **They extend time frames for review in every case of no tribal response from 30 days, to a minimum 88 days (three months), and perhaps much longer (nine months or more).**

2. **Where tribes do not respond, they require six redundant contacts to initiate consultation, and five mandatory waiting periods that the FCC cannot shorten or waive.**

3. **They provide a schedule for payment of fees to tribes by applicants (not by the FCC) and selectively quote the ACHP to justify an improper fee standard.**

4. **They unnecessarily require for every site, unless expressly waived by a tribe, a full, detailed site survey for above ground properties, using qualified professional historians, and extending the APE to the extent of what can be seen (viewshed).**

5. **They require for every new site, unless waived, a full archeological site survey and shovel test, using qualified archeologists with local knowledge and experience.**

6. **They give tribes the right to determine adverse effects and SHPO-like power to execute a previously unknown document called an MOU, before effects can be resolved.**

7. **They give tribes previously unknown power to reverse their positions.**

8. They provide an <u>unnecessarily overbroad scope of confidentiality</u> (all information from the tribe or about tribal properties is confidential).

Conclusion

Because of the above-described problems, among others, the Wireless Coalition to Reform Section 106 and other industry members strongly suggest that the Commission address these problems by either: (1) delaying consideration of the NPA to provide time to develop more reasonable procedures in consultation with industry and other stakeholders; (2) adopting the NPA with Section IV. removed, to allow further development of this section, while tribal participation can continue to be governed by current law; or (3) assuring that the problems highlighted above are avoided in NPA, with flexible provisions that would accommodate reasonable revisions of the BPA.